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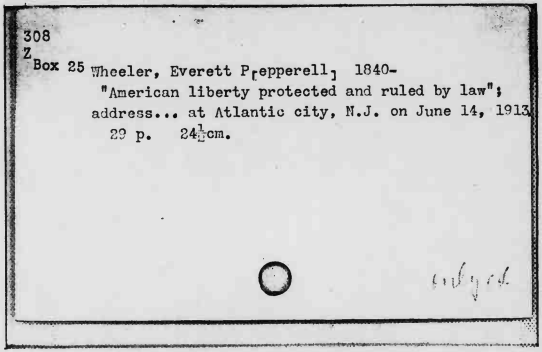
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"AMERICAN LIBERTY PROTECTED AND RULED BY LAW"

ADDRESS OF

HON. EVERETT P. WHEELER

BEFORE THE NEW JERSEY STATE BAR ASSOCIATION
AT ATLANTIC CITY, N. J., ON JUNE 14, 1913

Mm. 25, 1915-03.

"American Liberty Protected and Ruled by Law"

ADDRESS OF THE HON. EVERETT P. WHEELER, BEFORE THE NEW JERSEY STATE BAR ASSOCIATION, AT ATLANTIC CITY, NEW JERSEY, ON JUNE 14, 1913

Gentlemen of the New Jersey Bar:

The foreigner who takes the train at Eastport and travels through Boston, New Haven, New York, Newark, Philadelphia, Pittsburg, Chicago, St. Louis and Denver, to San Francisco and Seattle, stopping at this place and that as he journies, to study the life and business of men and women, is struck by the prosperity and activity of our people. Full of life, full of energy, and full of hope. To many millions America has been what Mary Antin calls it in her wonderful book—"The Promised Land"—"flowing with milk and honey"—"the glory of all lands."

Now, I am well aware that in this long journey the traveler would also witness suffering and sin, cruelty and oppression. But he would behold on every side earnest, conscientious men and women, some of whom are trying to mitigate the suffering and others to cure the disease. There are churches and synagogues, school houses, libraries and temples of justice. There are ministers, lawyers, doctors, nurses, teachers, engineers, captains and soldiers of industry, all integral parts of the body politic and striving loyally to do their duty to God and man. No doubt also there are greedy, licentious, luxurious, extravagant men and women. But was there ever a time when the public conscience was so keen to see and condemn evil? The calumnies of the press, bitter as they sometimes are, unconsciously bear

witness to an aroused public conscience, which cannot bear what it knows to be evil and struggles to overcome it. The struggle often is hysterical, the outcry unreasonable. But it is better than silence, a thousand times better than indifference.

The improvement in social conditions that the candid observer witnesses on every side is the result of gradual development. No doubt the introduction of machinery and of the steam engine in the eighteenth century and the extension of their use in the early part of the nineteenth led to many oppressive and burdensome conditions. Families were crowded in factories and mines. The hours of labor in these were often excessive, and children were set to work in a way that was destructive of childhood. But the public conscience soon quickened to the magnitude of these evils. In England Lord Shaftsbury was leader in the attempt to improve the conditions of working people and to restrict their hours of labor within reasonable limits. Soon intelligent and conscientious owners of factories came to realize that in their construction and management attention should be paid not only to the immediate product, but to the treatment of the workmen. Improvements in these respects have been steadily introduced. As long ago as 1882 in Connecticut I saw the great factories of the Willimantic Thread Company, under the management of Colonel Burrows. They were well ventilated and well lighted. Flowers were kept in the windows and constant attention was paid to the removal of the filaments of cotton which naturally separated themselves in the process of manufacture. In the Hope Mills, in Rhode Island, belonging to the Goddard family—in the woolen mills in the same State belonging to the Hazard family, I saw not long afterwards similar attention paid to the comfort and convenience of the working people. The same is true in remarkable degree of the factories of the Cash Register Company, in Dayton, Ohio. After the late flood these buildings, erected as they were on high ground, became a harbor of refuge to the fugitives from the torrents that poured down the valleys and flooded the plains. A delegation from Europe, which has recently visited this country, declares that conditions in American factories are, on the whole, the best in the world.

In the gradual course of evolution it became evident, not only that it was desirable that the buildings in which work people were engaged should be clean, well ventilated and well lighted, but that more adequate provision should be made for the comfort and convenience of the working men and working women within them. Accordingly in many factories in different parts of the country a department of social welfare has been established. One of these is connected with the Bush Terminal on the Brooklyn side of the harbor of New York. This company has a water front of half a mile. It affords every facility to manufacturers for receiving their material directly from the vessels at the pier, working them up in their factories by power furnished by the Terminal Company, in buildings heated and lighted by that company, and then shipping the produce of the manufacturer direct from the factory by rail or water to every part of the world. In short, the expense of handling is reduced to a minimum. It has done everything to promote the success of the employer. But it is not unmindful of the employed. Sitting rooms are provided where women and girls employed in the place can rest during their lunch hour. A restaurant has been established where employes can get a good meal at a cheap rate; provision is made for the savings of the workingmen, and even loans to them in cases of emergency at very moderate rates of interest. In short, the relation that has been there established between the employer and employed is one of mutual confidence and friendly co-operation. I speak of this because I have seen it; but I know from the observation of others that there are many similar establishments, in which the managers are sufficiently enlightened to perceive that this is the relation that should exist in all establishments in which working people are employed. They realize, in short, the true American principle—that the welfare of one is the welfare of all; that the interests of the employer and employed in the long run are identical, and that the best results for the whole commonwealth are to be obtained by extending equal and impartial justice to every individual.

About the time of the Civil War the attention of Christian and benevolent people was awakened to the crowding of families

in the cities of that day. None of these would now be called great, but there was congestion much worse than there is now. Committees of citizens were appointed in New York and other cities to investigate the subject. The interest of the public was aroused; individuals showed what could be done in the way of improving tenements, and there has been a gradual development of these, increasing in convenience with every new construction. Alfred White, in Brooklyn, was one of the first in this country. His example was followed by others. Great companies have later been formed for the same purpose. It is not too much to say that there were no buildings in America seventy-five years ago that had the comfort and conveniences of the improved tenements that are now in use in the city of New York. In Philadelphia and in Baltimore the tendency has been to put up small houses covering a larger area. Different cities have different conditions, and naturally deal with the subject in different ways. But I call your attention to the fact that in every part of the United States improvement in the houses of the plain people is progressive. Except in a few isolated districts no decent American family now lives in such a house as that in which Abraham Lincoln was born.

You ask me why I have begun this address with this brief sketch of the evolution of social conditions in this country. I answer, it is because our system was in the judgment of the founders an experiment. We have tried it for one hundred and twenty-four years. Is it a success? If so, let us go on with it courageously. If not, give it up. Many people declare that it is a failure. They have become aware that there are still evils to be removed, and sins to be struggled against. They impatiently denounce existing conditions and boldly declare that there is no remedy for them except by social revolution. I read the other day, for example, in a circular sent to me for a subscription:

"* * * Decent normal living is impossible under the present housing conditions in New York."

I dare to assert that this is untrue. I know from personal experience and observation that the people of New York City

are much better clothed and fed and housed than they were sixty years ago; the streets are cleaner, better lighted; the water supply is more ample, the means of transportation from one part of the city to another are more adequate; parks and playgrounds have greatly multiplied; the whole condition of city life is more healthful than it was sixty years ago. The schools are better, are more numerous even in proportion to the great advance in population, and are better equipped and better taught. The churches and synagogues are more active and reach larger portions of the community. Activity in philanthropic work is far greater and more general. In short, I assert, as a result of my own experience, that we have made enormous progress during this period, so that the majority of New Yorkers can and do live decent, normal, useful and happy lives.

Again, I see it asserted in a periodical published by the members of one of our philanthropic societies that the majority of wage earners or laborers in the United States are not being paid a decent living wage. That, I assert, to be untrue. I know these people well—not only from what I read about them in books, but from what I have seen of them in their own houses in the city and in the country—and I declare as truth, indisputable by any who will take the pains to study and investigate at first hand, with candid eye, and not with a feverish and pessimistic glance, that the majority of the wage earners and laborers in the United States are paid a decent living wage and do live decently.

Again I see it stated in the same periodical "that justice does not exist alike for the rich and the poor is a common day experience." I have practiced law for fifty years in the Federal courts in many Circuits, and in the State courts of New York and New Jersey; it has been part of my professional duty to study the reports of other States, and I can declare that this is untrue. You, my brethren, will join with me in the assurance. I do not mean to say that the courts are infallible. But I do say that in the controversy between a poor man and a rich the scales more often incline in favor of the poor. The temper of both Judge and Jury is to make every allowance on that side of the case, rather than to discriminate in favor of the rich.

Far be it from me to assert that there are no faults in our social system. I know there are many and for years have done my part with diligence and earnestness to correct them. What I do object to is the indiscriminate attack upon existing conditions. What our fathers strove to accomplish, and what they did accomplish, was to send down upon the dry and parched field a refreshing shower that would quicken every drooping plant. What the revolutionists are striving to accomplish is a flood, like that which we have just deplored in Ohio, which sweeps away the results of toil and experience and makes a desert where once there was fertility.

Again, I do not mean to say that everybody is as comfortable as everybody else. That would be ridiculous. What I do assert is the fundamental principle of American democracy, that the man or the woman who is thrifty, industrious and honest shall have an opportunity to better his condition and by saving something from the result of his toil climb to a higher level. The revolutionists forget that all wealth is the result of co-operation and that whatever tends to produce enmity between the creative mind that plans the work and the industrious hand that does it cripples both the head and the hand. The American conception of democracy is to give to each citizen an opportunity to make the most of his natural gifts, to restrain him from unlawful interference with the rights of his neighbor, and to teach him to rely for success on the blessings of God, and on his own honest industry and dauntless courage. This is the law of God, and our fathers embodied it in our Constitution. Emerson only paraphrases the words of Scripture when he describes the Lord saying to the people of America:

"I cause from every creature
His proper good to flow;
As much as he is and doeth,
So much he shall bestow."
"The world was made for honest trade,
To plant and eat be none afraid."
"For he that worketh high and wise,
Nor pauses in his plan
Shall take the sun out of the skies
Ere freedom out of man."

American Freedom is the child of American Democracy. It involves equal rights and equal duties. It involves on the one hand the supremacy of law, on the other it means freedom from needless governmental restraint. The distinctive American idea which we ought to cherish sacredly and from which we should never depart is that the greatest good of the greatest number can be best achieved by giving to each individual the right to work out his own salvation.

Long before 1789 other nations had tried forms of government in which the will of the public officials was supreme and in which the individual had no protection from arbitrary power. By the law of the Roman Empire the will of the Prince was paramount. He had the right by special decree to interpret statutes in reference to cases pending in the courts.

Sic volo, sic jubeo, stei pro ratione voluntas.

The result was tyranny, not freedom.

The Legislative Assembly in France in the days of the Directory had unlimited powers. They were constantly depriving citizens of life, liberty and property without due process of law. The result was justly called the Reign of Terror, and it resulted in national ruin and disgrace. At last Napoleon got into the saddle and at least gave the people security and order. All experience shows that the honest, hardworking people who are the real life and strength of a nation will not long submit to be plundered or oppressed by public officers, even though these were selected by a temporary majority of voters. The real majority will have security and order at any cost. The American method embodied in the American Constitution maintains security and preserves order, and protects the life, liberty and property of the individual from unlawful restraint or interference. It is a distinct evolution in civilization. To it in large measure we owe that security and good government which have stimulated our youth to diligent endeavor, and made us on the whole a happy and prosperous people. The American system is a success; a glorious, unprecedented success.

Let me then adjure you, as members of an honorable and ancient profession, not to bow down before the idol of the omni-

potence of government, whether by individuals or by temporary majorities. "Do not become entangled again in a yoke of bondage," or believe for a moment that your salvation is to be found in numerous and complicated governmental requirements. That is an European idea which our fathers discarded. On the fragments of that shattered idol they reared the American Republic. I adjure you, as you value the welfare of your children, and your country, to stand up bravely for the true American principle of the dignity of labor, of the love of labor, of the security of labor and of the freedom of labor. This is our famous quadrilateral. If the men and women of America are true to these principles and exert their mighty inflence in their protection and defense, the assaults of our domestic enemies will be as impotent as the clouds that pass across the sky to impair the heat and light of the sun. These may be obscured for a time, but they cannot be quenched.

Let no one suppose from what I have said that I attribute all the prosperity of America to the principles embodied in the Constitution. I realize fully, and gladly declare that our unexampled growth and prosperity are due in large part to the unsurpassed natural advantages of our country—its endless variety of climate, its forests, its mines, its fertile plains, its broad rivers. These God gave to us, and He gave to our fathers what was more than these, reverence for Him and for His laws; the faith that prosperity can only be obtained or preserved by obedience to those immutable laws of right and well-doing, which are as fixed and essential as the law of gravitation. You might as well undertake to build a house regardless of the law of gravitation, as to build a commonwealth regardless of the law of right and justice and mercy.

But while I realize strongly the truth of what I have just said, yet I realize also that upon the constitution of the government of a country much depends. It would be absurd to say that the prosperity and happiness of the people of France were not greatly impaired and the efforts of the honest and industrious greatly impeded by the tyranny and oppression that prevailed in that country during the greater part of the seventeenth

and eighteenth centuries. Any one who visited Venice when it was subject to the Austrian tyranny and visits it now can see the incalculable difference between a free and despotic government. It is with no vain idolatry that I reverence the Constitution of the United States, and that I come to you to-day to point out its essential and distinctive feaures which form a vital part of the true life of the country, and which are now being re-examined by men who have forgotten the elementary principles of our government and have not studied, or if they have, have forgotten its history.

Many of the propositions which are now being advocated in this country would change radically the character of the American system of government. The distinctive principle of that system, embodied not only in the United States Constitution, but in that of all the States prior to the present century, is this: The Legislature is not omnipotent; a temporary majority is not omnipotent and omniscient. The people are not willing to entrust their representatives or themselves with unlimited power. Therefore the people adopt written constitutions which regulate and restrain the exercise of legislative and executive power, and establish courts with power adequate to enforce these constitutional restrictions, and thereby give security to every citizen.

No such system existed anywhere in the world before the year 1789. The people of the United States prior to that time had bitter experience in dealing with a Parliament that claimed to be omnipotent, and with Legislatures of the separate Colonies that were not in fact restrained by any written constitution. The result was no doubt much worse in the United States than in Great Britain, for the thirteen Colonies discriminated against each other in various ways and refused to obey the requirements of the central Confederate government. Each Legislature felt its power to be unlimited by anything but its own sense of right. Each temporary majority voted to do what was right in its own eyes. The result was lawlessness, bankruptcy and absolute loss of credit.

The condition of the country in 1786 is graphically described in an "Act of the General Assembly of the Commonwealth of

Virginia, begun and held at the public buildings in the city of Richmond, on Monday, the 16th day of October, in the year of our Lord 1786.

"And whereas, the General Assembly of this Commonwealth, taking into view the actual situation of the Confederacy, as well as reflecting on the alarming representations made from time to time by the United States in Congress, particularly in their act of the 15th day of February last, can no longer doubt that the crisis is arrived at which the good people of America are to decide the solemn question, whether they will, by wise and magnanimous efforts, reap the fruits of that independence which they have so gloriously acquired, and of that Union which they have cemented with so much of their common blood, or whether, by giving way to unmanly jealousies and prejudices, or to partial and transitory interests, they will renounce the auspicious blessings prepared for them by the Revolution, and furnish to its enemies an eventual triumph over those by whose virtue and valor it has been accomplished; And whereas, the same noble and extended policy, and the same fraternal and affectionate sentiments which originally determined the citizens of this Commonwealth to unite with their brethren of the other States in establishing a Federal Government, cannot but be felt with equal force now as motives to lay aside every inferior consideration and to concur in such farther concessions and provisions as may be necessary to secure the great objects for which the Government was instituted, and to render the United States as happy in peace as they have been glorious in war."

The other twelve States which were members of the old Confederation accepted the invitation of Virginia, and delegates from every State met in convention in Philadelphia in 1787. On the seventeenth of September in that year they submitted the constitution, which they had formed, to the consideration of the States of Congress. This submission was accompanied with the following remarkable letter, a duplicate of which was sent to each State:

"In Convention, September 17, 1787.

"Sir: We have now the honor to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired that the power of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the General Government of the Union; but the impropriety of delegating such extensive trust to one body of men is evident; hence results the necessity of a different organization.

It is obviously impracticable, in the Federal Government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several States as to their situation, extent, habits and particular interests.

In all our deliberations on this subject we kept steadily in our view that which appears to us the greatest interest to every true American—the consideration of our Union—in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the convention to be less rigid on points of inferior magnitude than might have been otherwise expected; and thus the Constitution which we now present is the result of a spirit of amity, and of that mutual deference and concession which

the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every State is not, perhaps, to be expected; but each will doubtless consider that, had her interest been alone consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

With great respect, we have the honor to be, sir, your Excellency's most obedient and humble servants.

By unanimous order of the Convention.

GEORGE WASHINGTON,
President.

His Excellency the President of Congress."

I am referring you to these original documents because I had early impressed upon me by Theophilus Parsons, at Cambridge, the maxim of Lord Coke:

Melius est petere fontes, quam sectari rivulos. The whole trend of modern legal education is to study the law at the fountain head. In this distinguished assembly of lawyers I am sure this method will be approved. I therefore make no further apology for tracing from the original documents the development of the American idea to which I have already called your attention.

Let me read you then the following from the report of the proceedings of the United States Government at its Inauguration in the city of New York:

"Thursday, April 30, 1789.

"The oath of office having been administered by the Chancellor of the State of New York, in the presence of the Senate and House of Representatives, to George Washington, President of the United States, he then made the following Inaugural address:

* * * * * *

"In these honorable qualifications I behold the surest pledges that, as on one side, no local prejudices or attachments, no separate views, nor party animosities, will misdirect the comprehensive and equal eye which ought to watch over this great assemblage of communities and interests, so, on another, that the foundations of our national policy will be laid in the pure and immutable principles of private morality; and the pre-eminence of free government be exemplified by all the attributes which can win the affections of its citizens and command the respect of the world. I dwell on this prospect with every satisfaction which an ardent love for my country can inspire; since there is no truth more thoroughly established, than that there exists in the economy and course of nature an indissoluble union between virtue and happiness—between duty and advantage—between the genuine maxims of an honest and magnanimous policy and the solid rewards of public prosperity and felicity; since we ought to be no less persuaded that the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right, wihch Heaven itself has ordained; and since the preservation of the sacred fire of liberty, and the destiny of the republican model of government, are justly considered as deeply, perhaps as finally, staked on the experiment entrusted to the hands of the American people."

When Washington had selected his cabinet and set in motion the wheels of the new government and Congress had passed the Judiciary Act which provided for the organization of the Federal courts, he turned his attention to the selection of a Chief Justice of the United States and five associate justices of the Supreme Court. Of this choice he wrote to Edmund Randolph, the first Attorney General, September 27, 1789, three days after the approval of the Judiciary Act, as follows:

"Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country, and to the stability of its political system. Hence the selection of the fittest characters to expound the laws, and dispense justice has been an invariable object of my anxious concern."

For eight years Washington served his country as President. He adherred with steadfastness to the principles which he had announced in his inaugural and in the letter I have just read. He was bitterly assailed by the zealots of the time. Neither fame, nor virtue is secure from misunderstanding, suspicion or jealousy. But, like the tower on Minot's ledge, which Longfellow describes in his great poem of the Lighthouse, the billows of malice pressed steadily against his solid form, but could not shake it. They have long since dispersed into foam and fallen back into the deep. The character of our first President stands as lofty and pure and symmetrical as the monument which a grateful country has erected in the city that bears his name.

Seven years of his administration had passed, the time for the election of his successor approached, and he gave to our country his memorable Farewell Address. Already it had become manifest that the essential principle of the American system to which I have called your attention was irksome and burdensome to impatient members of the community. To them he addressed the following counsels, which are as timely to-day as they were on the seventeenth of September, 1796, when they were first given to our people.

"It is important, likewise, that the habits of thinking, in a free country, should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding, in the exercise of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate

of that love of power, and proneness to abuse it which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal, against invasions by the others, has been evinced by experiments, ancient and modern; some of them in our own country, and under our own eyes. To preserve them must be as necessary as to institute them. If in the opinion of the people, the distribution or modification of the constitutional powers be, in any particular, wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change or usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can, at any time, yield."

Three years passed away. Washington was taken from us. In January, 1800, Congress asked one of its members, General Lee, of Virginia, to deliver the funeral oration. Let me read to you from this memorable address.

"How novel, how grand the spectacle! Independent states stretched over an immense territory, and known only by common difficulty, clinging to their union as the rock of their safety, deciding by frank comparison of their relative condition, to rear on that rock, under the guidance of reason, a common government, through whose commanding protection, liberty and order, with their long train of blessings, should be safe to themselves, and the sure inheritance of their posterity."

* * * * * *

He concludes with the striking peroration:

"Methinks I see his august image, and hear, falling from his venerable lips, these deep-sinking words:

" 'Cease, sons of America, lamenting our separation; go on, and confirm by your wisdom the fruits of our joint councils, joint efforts, and common dangers. Reverence religion; diffuse knowledge throughout your land; patronize the arts and sciences; *let liberty and order be inseparable companions.*' "

In the very year of this oration, Thomas Jefferson was elected the third President of the United States. He delivered his inaugural address on the fourth of March, 1801. I conclude my quotations from the fathers of the Republic by reading to you a portion of this address:

"I know, indeed, that some honest men fear that a republican government cannot be strong—that this government is not strong enough. But would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm, on the theoretic and visionary fear that this government, the world's best hope, may, by possibility, want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern."

These references to the original archives of the Republic show clearly that the founders of our government believed that a State could not prosper unless the individual members were prosperous, and that no individual member could prosper unless he was secure in the right to earn an honest living and to enjoy the fruit of his labors. Liberty and order were to be inseparable. They therefore ordained and established the Constitution of the United States of America, "In order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessing of liberty to ourselves and our posterity."

The Third Article of this Constitution provides:

"Section 1. The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain or establish.

"Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

Thus the Supreme Court is made by the Constitution a coordinate branch of the United States Government.

In Article Six, Paragraph two, we have the final declaration:

"This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Under these provisions the Federal Circuit Courts, in 1791 and again in 1795, held that it was not only the right but the duty of the Court to decide that an act of the legislature in violation of the Constitution was void. (1) How otherwise could the provision be enforced that the Constitution was the Supreme Law? If a law is supreme, it must control. The only way to make its control effective is to enforce it. This enforcement is enforcing the authority that the people, in adopting the Constitution, gave to the Court. In short, the final authority is in the people, not in members of the legislature or in judges.

These decisions were in 1803 followed by the Supreme Court in *Marbury vs. Madison.* (2). In that famous case Chief Justice Marshall, delivering the opinion of the Court, stated (176-7) with his customary clearness the reasons which led the people to confer this great power upon the courts:

"That the people have an original right to establish, for their future government, such principles as, in their

opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.

"This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by any ordinary act.

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."

The famous debate in 1833 between Webster and Calhoun upon the right of secession turned upon this very point. Calhoun argued that the Constitution was a compact between sovereign States, that there was no common arbiter to decide disputes and that each State must therefore decide for itself. Webster argued:

"That the Constitution of the United States * * * is a government proper, founded on the adoption of the people. * * * That there is a supreme law, consisting of the Constitution of the United States, acts of Congress passed in pursuance of it, and treaties, * * * and in

cases capable of assuming, and actually assuming the character of a suit, the Supreme Court of the United States is the final interpreter."

It cost this nation thousands of lives and billions of money to establish and enforce this proposition of Daniel Webster. Those who assail it now are, in my judgment, as really secessionists as Beauregard was when he fired on Fort Sumter. They are just as honest and just as deluded.

In pursuance of the authority thus conferred by the Constitution, the Supreme Court rendered a series of decisions which really made us a nation. These declared that certain acts of local legislatures were void, and that the supreme law of the United States must control.

In *McCullough vs. Maryland, 4 Wheaton, 316*, the Court held that the Federal Government could not be controlled in the exercise of its functions by the taxing power of the State.

In *Gibbons vs. Ogden, 9 Wheaton, 1*, it held that commerce between the States could not be controlled by an act of the State Legislature.

In the *Bank of Augusta vs. Earle, 13 Peter, 519*, it held that a corporation incorporated under the laws of one State had a right to do business in another.

In the *Passenger Tax Cases, 7 Howard, 283-412*, the Supreme Court held that State statutes undertaking to regulate and control immigration into the United States were in violation of the Federal Constitution and that whole subject was a part of foreign commerce, which was under the exclusive jurisdiction of the Congress.

In every one of these cases the State Court had decided in favor of the validity of the obnoxious State statute.

It is not too much to say that if these four leading cases had been decided otherwise the United States would not have been a nation. Its government would not have been worth preserving, and would certainly have gone to pieces at the first serious assault. A nation whose agencies can be taxed out of existence by a part of the nation, whose citizens have no right

to trade or do business outside the limits of their own local jurisdiction, and whose foreign commerce is subject to the control of each particular part, is no nation at all. The bond of such a country would be a rope of sand.

It was then essential to our national existence that these several statutes which local legislatures had adopted should be annulled by some superior authority and that the rights which they assailed should in some way be vindicated.

There are only two ways in which such rights can be secured. One is peaceable, by an appeal to the courts; the other is forcible, by an appeal to arms. When the subject is seriously considered, it will appear that restrictions upon the power of the courts to enforce peaceably the guarantee of the Constitution will end inevitably in the reign of force and violence. Under conditions of force and violence justice is silent and the strongest prevails.

Just now it is fashionable to expatiate upon the action of courts in setting aside legislative statutes. But lawyers should remember that there have been many instances in the history of this country when legislatures have been partisan, oppressive and corrupt. Let me mention a few.

In the early days of the Republic all franchises were granted by special act. When the Federalists controlled the New York Legislature they refused to grant a banking franchise to their political opponents. The bank of the Manhattan Company is a perpetual reminder that Burr was obliged to obtain a banking franchise for his political supporters under cover of a franchise to supply the city of New York with water.

Similar abuses existed in all the States. Constitutional amendments were therefore adopted which prohibited the formation of corporations except under general acts.

Again, in many States the vast power of taxation has been exerted corruptly or unequally and constitutional amendments to prevent this abuse have been adopted. To what end is this, unless the Courts can enforce them?

And now let me sum up the essential elements of the American conception of democracy:

1. The right of every individual to life, liberty and the pursuit of happiness is sacred.

2. This right in every instance must be exercised with due regard for the similar rights of other individuals.

3. Life and liberty cannot be secure and the pursuit of happiness would be ineffective without the authority of government which shall preserve order and maintain the right of each citizen against invasion by others.

4. In order to accomplish these results there shall be a written constitution which defines the rights of the citizen and the power of the Government.

5. Courts of justice exist to explain this written constitution and secure the right of each individual from invasion. The judges of these courts shall be impartial, thoroughly acquainted with the law of our country and vested with the power of enforcing their decisions.

6. In cases where resistance to the law becomes so powerful and defiant that the power of the courts is not sufficient to deal with, the executive can call to its aid the posse comitatus, which posse may be organized into bodies of police. The executive may also invoke, in case of need, the support of the Army and Navy.

7. By faithful adherence to these principles the prosperity and happiness of every individual will be secured as far as the law can secure it.

I have read to you from the original archives the proofs that these elementary principles were in the minds of the fathers of the Republic, and that they were satisfied that the prosperity and happiness of the people could only be attained by faithful adherence to them. They knew very well that wise legislation must do its part, but they also know that this alone would not suffice.

Now let me reinforce what I have said by reading to you from the writings of a man who has for two successive terms filled the great office of President of the United States—a man

with whom I often disagree, but whose words always deserve consideration. A book called American Ideals, published by Theodore Roosevelt in 1897, contains the following:

> "Above all it is criminal to excite anger and discontent without proposing a remedy, or only proposing a false remedy. The worst foe of the poor man is the labor leader, whether philanthropist or politician, who tries to teach him that he is a victim of conspiracy and injustice, when in reality he is merely working out his fate with blood and sweat as the immense majority of men who are worthy of the name always have done and always will have to do.
>
> "The difference between what can and what cannot be done by law is well exemplified by our experience with the negro problem, an experience of which Mr. Watson must have ample practical knowledge. The negroes were formerly held in slavery. This was a wrong which legislation could remedy, and which could not be remedied except by legislation. Accordingly they were set free by law. This having been done, many of their friends believed that in some way, by additional legislation, we could at once put them on an intellectual, social, and business equality with the whites. The effort has failed completely. In large sections of the country the negroes are not treated as they should be treated, and politically in particular, the frauds upon them have been so gross and shameful as to awaken not merely indignation, but bitter wrath; yet the best friends of the negro admit that his hope lies, not in legislation, but in the constant working of those unseen forces of the national life which are greater than all legislation.
>
> "It is but rarely that great advances in general social well-being can be made by the adoption of some far-reaching scheme, legislative or otherwise; normally they come only by gradual growth, and by incessant effort to do first one thing, then another and then another. Quack remedies of the universal cure-all type are generally as noxious to the body politic as to the body corporal."

And now let me conclude with a consideration of some of the problems which in this country are now most serious. I will endeavor to point out briefly the spirit in which we should approach the difficult task of solving these problems in accordance with the fundamental principles of the American system.

One of the most striking features of the development of American life is the growth of great combinations. It is sometimes said that these are inconsistent with the ideals of American democracy. To me they seem an outgrowth of American freedom. The right of an individual to use to the best advantage the talents which God has given him, or which he has developed by education, should be sacred. It is mainly by this freedom that encouragement is given to such development. On the other hand the temptation that always comes to the powerful is to abuse power. To this end the law should be supreme, and the government should have full power to enforce it. The State on the one hand should refrain scrupulously from giving to any individual or association advantages which are denied to others. All should be on an equal plane of opportunity so far as the law can give it. All should be prevented as far as possible from using these opportunities to the injury of others. But the individual who makes the most of his opportunities for the benefit of others, and not to their injury, ought to have full scope for the development of his powers and the preservation of the rewards of his skill and diligence. These observations are just as applicable to combinations of labor as to combinations of capital. Combination increases the power of the individual. A labor organization is far more powerful than the individual workmen who compose it. An organization of men who have acquired property by their skill and diligence is also more powerful than the individuals of which it is composed. In either case the greater the power the greater the danger of its abuse. But it is not American to prohibit the organization. It is American to subject the same to reasonable and just laws. In a word, as Shakespeare puts it:

> "It is excellent to have a giant's strength,
> But it is tyrannous to use it like a giant."

On the one hand we ought not to put our men into straight jackets. On the other hand we must not let them become marauders. The law should not only punish excesses, whether committed by capital or labor organizations, but should enable all controversies between them to be peaceably settled. There are notable instances in the recent history of this country which point the moral of what I have just said.

In 1894 we had the so-called Pullman strike. Jane Addams has recently published a remarkable description of the causes of this strike. This description was written at the time and is full of instruction for the present. It was not poor wages, or excessive hours, or bad housing that was the grievance of the people of Pullman. I know myself from personal observation that there was probably no town in America in 1894, in which the houses were on the whole so comfortable or well ventilated or well drained as those which the Pullman Company had built for their work people. The real cause of the strike, as Jane Addams describes it, and as I think, correctly, was this: Mr. Pullman was conscious that he had done a great deal for the comfort and welfare of his working people. He felt that he had a right to control their manner of life in many ways. This control was obnoxious to them. They wanted their freedom of action. They would rather live in inferior houses, which they could more fully control. They were prosperous and well paid. They really struck for independence.

Very unreasonably they sought to involve in their controversy thousands of people who had no interest in it. They succeeded in persuading men who worked for railway companies to join in a sympathetic strike. They obstructed the transportation of passengers and freight, and even the United States mails were not sacred. There ought to have been at the time a tribunal created by law, before which both they and their employer could have been obliged to appear, and settle their dispute. No such arbitration tribunal then existed as has since been created by the Erdman Act. In this respect our law was then deficient and the result was a condition of the gravest danger, which Mr. Theodore Roosevelt, in the book to which I before referred, has thus described. (3).

"During the summer of 1894, every American capable of thinking must at times have pondered very gravely over certain features of the national character which were brought into unpleasant prominence by the course of events. The demagogue, in all his forms, is as characteristic an evil of a free society as the courtier is of a despotism; and the attitude of many of our public men at the time of the great strike in July, 1894, was such as to call down on their heads the hearty condemnation of every American who wishes well to his country. * * * Had it not been for the admirable action of the Federal Government, Chicago would have seen a repetition of what occurred during the Paris Commune, while Illinois would have been torn by a fierce social war; and for all the horrible waste of life that this would have entailed Governor Altgeld would have been primarily responsible. It was a most fortunate thing that the action at Washington was so quick and so emphatic. Senator Davis, of Minnesota, set the key of patriotism at a time when men were still puzzled and hesitated. President Cleveland and Attorney General Olney acted with equal wisdom and courage, and the danger was averted. The completeness of the victory of the Federal authorities, representing the cause of law and order, has been perhaps one reason why it was so soon forgotten; and now not a few shortsighted people need to be reminded that when we were on the brink of an almost terrific explosion the Governor of Illinois did his best to work to this country a measure of harm as great as any ever planned by Benedict Arnold, and that we were saved by the resolute action of the Federal judiciary and of the regular army. * * *

"Every true American, every man who thinks, and who if the occasion comes is ready to act, may do well to ponder upon the evil wrought by the lawlessness of the disorderly classes when once they are able to elect their own chiefs to power. If the Government generally got into the hands of men such as Altgeld, the Republic would go to pieces in a year; and it would be right that it should go to

pieces, for the election of such men shows that the people electing them are unfit to be entrusted with self-government."

We learned wisdom from this Pullman strike, and Congress provided a tribunal for the arbitration of disputes between common carriers and their employes.

Our experience during the present year, when a strike of locomotive firemen was threatened, shows the value of the tribunal thus created. The arbitrators, William L. Chambers, Albert Phillips and W. W. Atterbury, were competent men. They gave a full hearing to both sides and make a unanimous award. On the other hand, the tragical strikes at Lawrence and at Paterson show that provision similar to that of the Erdman Act should be made for arbitration of all labor disputes.

In short, we should not prohibit organizations of labor. Give free scope to their lawful activity, but restrain them from violence. Let tribunals be created for the peaceable settlement of controversies with their employers. This is the American system of liberty protected and ruled by law.

In like manner we should deal with combinations of capital. They should not be prohibited. They should not be limited in any beneficent activity. But they should be restrained effectively from what Mr. Justice Holmes called "destructive competition." That was the grievance that led to the adoption of the Sherman Act. So far as that was effected by rebates, it has already been suppressed. Any other forms of discrimination by which the strong seek to get advantage of the weak can also be suppressed. Give them fair play. If they can produce goods that the people want better and cheaper than their competitors, give the consumer the benefit. American Liberty stands erect and holds the scales of equal justice. She is hostile alike to the tyranny of the individual and to the tyranny of socialism. Socialism is slavery. Before the war the negroes of the South all had the minimum wage, the living wage, the widow's pension and the old age pension, Whether these measures are wise or unwise, I do not now discuss. But they formed a part of the slave

system. The negroes were set to work by superior authority and the greater number were not overworked. No doubt many were cruelly treated. That abuse is inseparable from absolute power. The tyranny of an absolute and temporary majority is as much to be feared as that of Legree.

Thus I have laid before you the fundamental principles of American democracy, which preserve the rights of the weakest individual and restrain the tyranny of the strongest.

It is to the eternal honor of our own profession that the men who took the most active part in framing the American Constitution, in enforcing and expounding it, were lawyers. The work of Alexander Hamilton, of James Madison, of John Jay, not only in framing the Constitution, but in defining and expounding its provisions in their immortal Federalist, can never be forgotten. Equally important was the part that John Marshall and Daniel Webster took in making this written instrument a living organism, in establishing cardinal principles for its interpretation and enforcement, which have given it vitality and permanence. We have amended it where it needed amendment, but its essential characteristics have been tried and found precious. It is for us, the members of the Bar of the Twentieth Century, to be loyal in the defense and faithful in the explanation of the distinctive American principles embodied in this Constitution. They are our noblest heritage. Every man who assails them and would overturn the foundations of the American Republic as we know it, is an enemy to the Commonwealth. In the name of democracy he would establish the tyranny of a mob.

"License, they mean, when they cry liberty,
For who loves that must first be wise and good."

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